Malaysia Discounts Bhd & Ors v Pesaka Astana (M) Sdn Bhd & Ors

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO (MT–1) 22–1 OF 2001
RAMLY ALI J
15 AUGUST 2008

Civil Procedure — Judgment — Consent judgment — Breach of — Second defendant not party to consent judgment — Second defendant's liability towards plaintiffs — Whether released notwithstanding the entry into judgment by another defendant

Civil Procedure — Preliminary objection — Disposal of case on point of law — Questions of law to be determined — Whether preliminary objection sustainable — Rules of the High Court 1980 O 14A

This civil suit involved the issuance by the first defendant (Pesaka) of RM140m worth of 'Al-Bai' Bithaman Ajil' bonds ('ABBA bonds') which were purchased by the ten plaintiffs, all of whom were financial institutions. The payment was duly made to the third defendant ('KAF Discounts') who then applied the payment to the account of the first defendant. The second defendant ('Mayban Trustees') was the trustee to the bondholders. The third defendant was the lead arranger, facility agent and issue agent. The bonds were redeemable at various dates in the total value of RM157,815,000 (a profit element of RM17,815,000). The obligation to make payment of the redemption sum was on the first defendant upon full maturity of the ABBA bond namely, on 30 September 2005. The primary relief sought by the plaintiffs was an order to recover monies owing to them due to the failure of the first defendant to redeem the first tranche of the ABBA bonds upon its maturity. Insofar as relief was concerned, the plaintiffs' claimed, inter alia, as against the first defendant, judgment of the sum of RM157,815,000 (now RM149,315,000) and as against the second defendant and third defendant, damages in the sum of RM149,315,000. The plaintiffs had entered into a consent judgment with the 10 other defendants in this civil suit on 7 July 2008. By the terms of the consent judgment, the first defendant agreed to pay the plaintiffs the sum of RM149,315,000 together with interest and costs. The consent judgment however, remained wholly unsatisfied although nearly one month had passed since the court recorded it. Following the above claim, the second defendant and third defendant raised a preliminary issue under

O 14A of the Rules of the High Court 1980, contending that the plaintiffs, by entering into consent judgment with the ten other defendants, could maintain their claim against them, and therefore the trial against them should not proceed. The second defendant had raised the following question to be determined by the court without full trial of the action: 'What is the consequence on the plaintiff's causes of actions and claims against the second defendant in these proceedings as a result of the consent judgment dated 7 of July 2008 that was made between the plaintiffs and the first, fourth, fifth, sixth to twelveth defendants?' Meanwhile, the third defendant raised the following questions to be determined by the court without full trial of the action: '(a) Assuming (and if it can be established) that KAF is in breach of its contractual obligations, as alleged in para 57 of the statement of claim, do the plaintiffs have a valid claim against KAF for damages other than nominal damages, given that the plaintiffs have entered into the consent judgment with all the defendants (except KAF and the second defendant)?; (b) Assuming (and if it can be established) that KAF is in breach of any duty of care towards the plaintiffs, as alleged in para 58 of the statement of claim, do the plaintiffs have a valid claim against KAF for damages other than nominal damages, given that the plaintiffs have entered into the aforesaid consent judgment?; and (c) On the plaintiffs' pleadings, and on the assumptions made in relation to questions (1) and (2) above, could KAF, in law, be liable jointly and severally with the first defendant and the second defendant for its breaches as alleged in paras 57 and 58 of the statement of claim.'

Held, dismissing the preliminary objections with costs:

(1) A consent judgment is to be interpreted in the same way as a contract. Thus, the usual principles of contractual construction apply in the instant case: the paramount consideration was to ascertain the intention of the parties to the consent judgment. Such intention was to be assessed objectively by the court, in particular by reviewing the language employed in the consent judgment. In this case, it was plain and obvious that the intention of the plaintiffs and the ten defendants who consented to the judgment was that the plaintiffs' case against second defendant and the third defendant remained unaffected, and should proceed to trial, as demonstrated by the express words in para 7 of the consent judgment (see paras 41 & 46).

(2) From the perspective of a breach of contract cause of action, if it is a case of successive contract-breakers, consent judgment with one contract-breaker has no effect on another contract-breaker. The breach of contract cause of action was pleaded against first, second and third defendants. All the three defendants were in breach of their individual obligations under the numerous interlinked but separate bond

contracts. In law, the said three defendants were known as 'successive contract-breakers' (see paras 55–56).

(3) It is an established legal principle that if two or more several tortfeasors are sued, settlement with one tortfeaser does not release the others. It would immediately become clear that the torts committed by the second and third defendants were several in nature: they were separate torts committed independently by each of them at different points of time, and not jointly. In other words, the plaintiffs did not allege collusion or conspiracy on the part of the second and third defendants (see paras 59 & 62).

(4) Based on the above considerations, the answers to all the three questions posed by the third defendant should be in the affirmative. While, the answer to the sole question posed by the second defendant was that there was no consequence on the plaintiffs' action and claims against the second defendant in these proceedings as a result of the consent judgment that was made between the plaintiffs and the other defendants (see paras 20, 39 & 66).

[Bahasa Malaysia summary

Guaman sivil yang melibatkan terbitan RM140j nilai bon 'Al-Bai' Bithaman Ajil' ('bon ABBA') oleh defendan pertama yang telah dibeli oleh sepuluh plaintif yang kesemuanya adalah institusi kewangan. Pembayaran telah dibuat kepada defendan ketiga ('KAF Discount') yang kemudiannya menggunakan pembayaran tersebut ke akaun defendan pertama. Defendan kedua ('Mayban Trustees') adalah pemegang amanah kepada pemegang-pemegang bon. Defendan ketiga adalah penyusun utama, agen kemudahan dan agen penerbitan. Bon-bon adalah boleh tebus pada pelbagai tarikh dalam jumlah keseluruhan sebanyak RM157,815,000 (elemen keuntungan sebanyak RM17,815,000). Tanggungjawab untuk membuat pembayaran jumlah penebusan adalah ke atas defendan pertama apabila bon ABBA cukup matang iaitu, pada 30 September 2005. Relief utama yang dipohon oleh plaintif-plaintif adalah perintah untuk mendapatkan semula wang yang terhutang kepada mereka disebabkan kegagalan defendan pertama menebus semula tranche pertama bon ABBA apabila tempoh matangnya. Selanjutnya, berkenaan dengan relief yang dipohon, plaintif menuntut, antara lain, terhadap defendan pertama, penghakiman untuk sejumlah RM157,815,000 (sekarang ini RM149,315,000) dan terhadap defendan kedua dan defendan ketiga, gantirugi sejumlah RM149,315,000. Plaintif-plaintif telah memasuki satu penghakiman persetujuan dengan 10 defendan yang lain di dalam guaman sivil ini pada 7 Julai 2008. Melalui terma-terma penghakiman persetujuan, defendan pertama bersetuju untuk membayar plaintif-plaintif sejumlah RM149,315,000 bersama-sama dengan

faedah dan kos. Walau bagaimanapun, penghakiman persetujuan kekal tidak dijelaskan walaupun hampir sebulan berlalu semenjak mahkamah merekodkannya. Berlanjutan daripada tuntutan di atas, defendan kedua dan ketiga membangkitkan isu awal di bawah A 14A Kaedah-Kaedah Mahkamah Tinggi 1980, menegaskan bahawa plaintif-plaintif, dengan memasuki penghakiman persetujuan dengan 10 defendan yang lain, boleh mengekalkan tuntutan terhadap mereka, dan oleh itu perbicaraan terhadap mereka seharusnya tidak diteruskan. Defendan kedua telah membangkitkan persoalan berikut untuk ditentukan oleh mahkamah tanpa melakukan perbicaraan penuh: 'Apakah akibat terhadap kausa tindakan plaintif dan tuntutan terhadap defendan kedua di dalam prosiding ini yang disebabkan oleh penghakiman persetujuan yang bertarikh 7 Julai 2008 yang telah dibuat di antara plaintif-plaintif dengan defendan pertama, keempat, kelima dan keenam hingga keduabelas?' Sementara itu, defendan ketiga telah membangkitkan persoalan berikut untuk ditentukan oleh mahkamah tanpa melakukan perbicaraan penuh: (a) Mengandaikan (dan jika ianya boleh dibuktikan) bahawa KAF adalah memungkiri tanggungjawab kontraktualnya, seperti yang didakwa di perenggan 57 pernyataan tuntutan, adakah plaintif mempunyai tuntutan yang sah terhadap KAF untuk ganti rugi selain daripada ganti rugi nominal, yang mana plaintif telah memasuki penghakiman persetujuan dengan kesemua defendan (melainkan KAF dan defendan kedua)?; (b) mengandaikan (dan jika ianya boleh dibuktikan) bahawa KAF dalam kemungkiran mana-mana kewajipan berjaga-jaga terhadap plaintif-plaintif, seperti yang didakwa di perenggan 58, pernyataan tuntutan, adalah plaintif-plaintif mempunyai tuntutan yang sah terhadap KAF untuk ganti rugi selain daripada ganti rugi nominal, yang mana plaintif telah memasuki penghakiman persetujuan tersebut?; dan (c) berdasarkan pliding plaintif, dan atas anggapan yang dibuat berkaitan dengan persoalan (1) dan (2) di atas, bolehkah, KAF dalam undang-undang, bersesama dan berasingan bertanggungan dengan defendan pertama dan defendan kedua untuk kemungkirannya seperti yang didakwa di perenggan-perenggan 57 dan 58 pernyataan tuntutan.

Diputuskan, menolak bantahan awal dengan kos:

(1) Satu penghakiman persetujuan perlulah ditafsirkan sama seperti kontrak. Oleh itu, prinsip biasa pembuatan kontrak terpakai di dalam kes ini; pertimbangan utama adalah untuk menentukan niat pihak-pihak kepada penghakiman persetujuan. Niat tersebut hendaklah ditaksirkan secara objektif oleh mahkamah, yang tertentu dengan menyemak bahasa yang digunakan di dalam penghakiman persetujuan. Dalam kes ini, adalah mudah dan jelas bahawa niat plaintif dan sepuluh defendan yang bersetuju dengan penghakiman adalah bahawa kes plaintif terhadap defendan kedua dan ketiga kekal tidak terjejas dan

seharusnya diteruskan dengan perbicaraan, seperti yang ditunjukkan oleh perkataan-perkataan yang jelas di perenggan 7 penghakiman persetujuan (lihat perenggan 41 & 46).

(2) Daripada perspektif kausa tindakan kemungkiran kontrak, jika ianya adalah satu kes pemungkir-pemungkir kontrak yang berturutan, penghakiman persetujuan dengan satu pemungkir kontrak tidak menjejaskan pemungkir kontrak yang lain. Kausa tindakan kemungkiran kontrak telah diplidkan terhadap defendan pertama, kedua dan ketiga. Kesemua ketiga-tiga defendan adalah memungkiri tanggungjawab individu mereka di bawah beberapa perkaitan tetapi kontrak bon berasingan. Dalam undang-undang, ketiga-tiga defendan tersebut adalah dikenali sebagai 'pemungkir-pemungkir kontrak yang berturutan' (lihat perenggan 55–56).

(3) Adalah prinsip perundangan yang kukuh bahawa jika dua atau lebih pelaku-pelaku tort didakwa, penyelesaian dengan seorang pelaku tort tidak melepaskan yang lain. Ianya secara langsung menjadi jelas bahawa tort yang dilakukan oleh defendan kedua dan ketiga adalah bersifat berasingan: terdapat perlakuan tort yang berasingan secara sendirinya pada masa yang berlainan dan tidak bersesama. Dalam erti kata lain, plaintif-plaintif tidak mendakwa pakatan sulit atau konspirasi bagi pihak defendan kedua dan ketiga (lihat perenggan 59 & 62).

(4) Berdasarkan kepada pertimbangan di atas, jawapan kepada kesemua tiga soalan yang dikemukakan oleh defendan ketiga sepatutnya adalah pengesahan. Sementara, jawapan kepada satu-satunya soalan yang dikemukakan oleh defendan kedua adalah bahawa tidak terdapat kepentingan atas tindakan plaintif dan tuntutan terhadap defendan kedua dalam prosiding ini disebabkan oleh penghakiman persetujuan tersebut telah dibuat di antara plaintif-plaintif dan defendan-defendan yang lain (lihat perenggan 20, 39 & 66).]

Notes

For cases on consent judgment, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3787–3801.

For cases on preliminary objection in general, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5830–5859.

Cases referred to

Apley Estates Co v De Bernales [1947] 1 All ER 213 (refd)
Arab-Malaysian Finance Bhd v Steven Phua [2003] 1 MLJ 567 (refd)
Dingle v Associated Newspaper Ltd [1961] 1 All ER 897 (refd)
Gardiner v Moore [1966] 1 All ER 365 (refd)
Heaton v AXA Equity & Law Assurance Society plc [2000] 4 All ER 673 (refd)
Heaton v AXA Equity & Law Assurance Society plc [2002] 2 AC 329 (refd)

Jameson v Central Electricty Generating Board [1999] 1 All ER 193 (refd)
Koursk, Re [1924] P 140 (refd)
Mahesan v Malaysia Government Officers' Co-operative Housing Society Ltd [1978] 2 All ER 405 (refd)
Majlis Perbandaran Ampang Jaya v Steven Phua [2006] 2 MLJ 389 (refd)
Personal Representatives of Tang Man Sit v Capacious Investments Ltd [1996] AC 514 (refd)
United Australia Limited v Barclays Bank, Limited [1941] AC 1 (refd)
Wah Tat Bank Ltd v Chan Cheng Kum [1975] 2 All ER 257 (refd)

Legislation referred to
Civil Law Act [Sing] s 11(1)(a)
Civil Law Act 1956 s 10
Rules of the High Court 1980 O 14A, O 33 r 2

Tommy Thomas (Sitpal Selvaratnam & Alan Gomez with him) (Tommy Thomas) for the plaintiff.
Ganesan K (Sheik & Shaik) for the first, fourth, fifth to 12th defendant.
Robert Lazar (Gopal & Mark Lau Sreenevasan with him) (Sivanathan) for the second defendant.
Raja Aziz Addruse (Mohd Zaini Mazlan with him) (Zaini Mazlan) for the third defendant.

Ramly Ali J:

THE APPLICATION

[1] Enclosure 208 and encl 205 are the applications by the second defendant (Mayban Trustees) and the third defendant ('KAF Discounts') respectively by way of preliminary issues under O 14A of the Rules of the High Court 1980 ('the RHC'). In essence, the said defendants contend that the plaintiffs by entering into consent judgment with the ten other defendants in this civil suit in encl 200 on 7 July 2008 cannot maintain their claim against the second and third defendants, and therefore the trial against them cannot proceed.

[2] The applications are made pursuant to O 14A and O 33 r 2 of the RHC.

THE PLAINTIFFS' CLAIM

[3] This civil suit involves the issuance by the first defendant ('Pesaka') of RM140m worth of 'Al-Bai' Bithaman Ajil' bonds ('ABBA bonds') which were purchased by the ten plaintiffs, all of whom are financial institutions, and which Pesaka failed to redeem on the maturity date.

[4] In essence, Pesaka borrowed a sum of RM140m from the bondholders, upon its promise to repay the latter a sum of RM157,815,000. Because the ABBA bonds are Shariah compliant, interest does not accrue. Instead, a profit element of RM17,815,000 (RM157,815,000 less RM140,000,000) is due and payable by Pesaka upon full maturity of the ABBA Bond, that is, 30 September 2005.

[5] The primary relief sought by the plaintiffs is an order to recover monies owing to the plaintiffs by reason of the failure by Pesaka to redeem the first tranche of the ABBA bonds upon their maturity on 30 September 2005, and the resulting declaration by Mayban Trustees (the second defendant) of an event of default on the part of Pesaka.

[6] Insofar as relief is concerned, the plaintiffs' claims are as follows:

(a) as against Pesaka (the first defendant), judgment in the sum of RM157,815,000 (now RM149,315,000).

(b) as against Mayban Trustees (the second defendant) and KAF (the third defendant), damages in the sum of RM149,315,000 or any other sum that the court deems fit and proper.

(c) as against the fourth to 12th defendants, general damages;

(d) a declaration that in consequence of the lifting of the corporate veil of each of the sixth to 12th defendants, the assets and properties of each of the said defendant belong in equity to Pesaka and/or Rafie (fourth defendant) and/or Murnina (fifth defendant);

(e) a declaration that all the assets and properties of Pesaka, Rafie and Murnina belong in equity to the plaintiffs;

(f) an order that all the assets and proceeds of the sixth to 12th defendants, Rafie and Murnina be traced and thereafter applied to discharge the indebtedness of Pesaka to the plaintiffs; and

(g) as against all the defendants:

(i) interest on all amounts ordered to be paid to the plaintiffs at 8% per annum from 1 October 2005 to the date of payment, or at such rate and for such period as the court deems fit;

(ii) costs; and

(iii) further or other relief.

THE PARTIES INVOLVED

[7] The first defendant issued bonds to the value of RM140m. The bonds were redeemable at various dates in the total value of RM157m. Redemption will take place by payment of the value to these bondholders at the material times. The obligation to make payment of the redemption sum is that of the first defendant.

[8] The plaintiffs were the holders of the bonds at the material times and had purchased the bonds from the primary subscriber, namely K&N Kenanga Bhd. Payment was duly made to the third defendant who then applied the payment to the account of the first defendant.

[9] The second defendant was the trustee to the bondholders. But more importantly in the context of this suit, they were to be authorised signatories to certain bank accounts.

[10] The third defendant was the lead arranger, facility agent and issue agent. the second and third defendants had different roles to play in this transaction.

[11] The sixth to 12th defendants are the companies which are alleged to have received some of the proceeds of the bonds. They are alleged to be in the 'same stable' as the first defendant and under the control of the fourth and fifth defendants.

[12] The fourth and fifth defendants were directors of the first defendant, as well as the sixth to 12th defendants and have been sued on the basis that they are the controlling and directing minds of all these companies.

THE 'BONDS CONTRACTS'

[13] The issuance of the ABBA bonds by Pesaka is governed by the following contracts or agreements, namely:

(i) Information memorandum issued by Pesaka (dated 15 March 2004);

(ii) Trust deed between Pesaka and Mayban Trustees (dated 19 March 2004);

(iii) Subscription and facility agreement between Pesaka, KAF and K&N Kenanga Bhd (dated 19 March 2004);

(iv) Release and assignment agreement between Pesaka, KAF and Bank Pembangunan Infrastruktur Malaysia Berhad (dated 19 March 2004);

(v) Release and assignment agreement between Pesaka, KAF and BCBB (dated 19 March 2004);

(vi) Asset purchase agreement between Pesaka, Kenanga and KAF (dated 19 March 2004);

(vii) Asset sale agreement between Pesaka, Kenanga and KAF (dated 19 March 2004);

(viii) Deed of assignment and charge between Pesaka and Mayban Trustees (dated 19 March 2004);

(ix) Power of attorney executed by Pesaka in favour of Mayban Trustees (dated 19 March 2004);

(x) Depository and paying agency agreement between Pesaka, Mayban Trustees, KAF and Bank Negara Malaysia (dated 22 March 2004); and

(xi) Deed of assignment between Pesaka and Mayban Trustees (dated 1 April 2004).

THE PLAINTIFFS' CAUSES OF ACTIONS

[14] A review of the statement of claim filed in this suit will indicate that eight different causes of actions have been pleaded on behalf of the plaintiffs against the 12 defendants. The 12 defendants can be placed in two categories. The first category comprises Pesaka, Mayban Trustees and KAF. Each of them participated in the issuance of the bonds in April 2004, and have been sued for the roles they played arising therefrom. The second category consists of the other nine defendants, that is, the fourth to the 12th defendants. None of them were directly involved in the issuance of the bonds. The complaints that the plaintiffs, have against them arise from the fact the assets belonging to Pesaka are, and were held in trust, by each of them. The eight causes of action against the 12 defendants can be summarised as follows:

(a) Pesaka (first defendant)

Breach of contract — failure to redeem the first tranche of the bonds when they matured on 30 September 2005

(b) Mayban Trustees (second defendant)

(i) Breach of trust — failure to ensure that it was at all material times the sole signatory to the three trustees accounts.

(ii) Breach of contract — particularly the trust deed.

(iii) Negligence — breach of duty of care.

(c) KAF Discounts (third defendant)

(i) Breach of Contract — particularly the subscription agreement with regard to the opening of the three trustee accounts which required Mayban Trustees to be the sole signatory.

(ii) Negligence — breach of duty of care.

(d) Rafie (fourth defendant); Murnina (fifth defendant) and the Amdac companies (sixth to 12th defendants)

Constructive trust and tracing — defendant four to defendant 12 are holding Pesaka's monies/assets in constructive trust for the benefit of the plaintiffs, which the plaintiffs are entitled to trace.

(e) The Amdac companies (sixth to 12th defendants)

Lifting the corporate veil — the corporate veil of each of the seven Amdac companies should be lifted so that the true state of affairs of their control by Rafie and Murnina become clear.

DEFAULT BY THE FIRST DEFENDANT

[15] The primary obligation in the whole series of events was that of the first defendant ie to make good the promise to pay the bonds on the due date (maturity date). If that had been done in accordance with the schedule of payments, this suit would never have been commenced by the plaintiffs. But the first defendant failed to redeem the bonds on 30 September 2005, on the first redemption. Accordingly, a default was called and this suit was promptly commenced by the plaintiffs.

[16] Shortly, thereafter, the plaintiffs obtained Mareva injunctions against the Mareva defendants. Although it was initially dissolved by the High Court at the inter parties stage, on appeal the Court of Appeal allowed the plaintiffs' appeal and restored the Mareva injunctions.

CONSENT JUDGMENT

[17] On 7 July 2008, a consent judgment (vide encl 200) was entered into between the plaintiffs and the first, fourth, fifth, sixth to 12th defendants (except the second and third defendants). This terms of the consent judgments are reproduced below:

(1) The plaintiffs shall not rely on the allegations pleaded in paras 49, 65 and 68 of the statement of claim insofar as the plaintiffs' case against the first and fourth to 12th defendants ('the said defendants') are concerned.

(2) The plaintiffs withdraw their case against the fifth defendants, with no order as to costs. All interlocutory injunctions granted against the fifth defendant cease to have effect from this day. The fifth defendant shall

not seek damages, compensation or other orders against the plaintiffs by reason of the granting and the existence of the said injunctions.

(3) The first defendant consents to judgment in terms of the relief sought in the statement of claim filed on behalf of the plaintiffs in this suit, that is:

(i) judgment for the plaintiffs in the sum of RM149,315,000;

(ii) interest on the said sum of RM149,315,000 at 8%pa from 1 October 2005 to the date of payment; and

(iii) costs.

(4) The fourth and sixth to 12th defendants consent to judgment in terms of the relief sought in the statement of claim filed on behalf of the plaintiffs in this suit, that is:

(i) general damages to be assessed;

(ii) interest thereon at 8%pa from 1 October 2005 until payment; and

(iii) costs.

(5) All interlocutory injunctions granted against the first, fourth and sixth to 12th defendants shall cease to have any effect from this day. The first, fourth and sixth to 12th defendants shall not seek damages, compensation of any other orders against the plaintiffs by reason of the granting and existence of the said injunctions.

(6) The first defendant shall participate and pursue its defence and/or counterclaim for such relief and/or damages and losses against the second and third defendants in this suit.

(7) The consent judgment herein between the plaintiffs and the said defendants shall not prejudice or affect the plaintiffs' claim in this civil suit against the second and third defendants, which shall proceed to trial.

[18] In the consent judgment, it appears that the plaintiffs shall not rely on the plea of fraudulent breach of trust against all the relevant defendants (except the second and third defendants).

[19] Judgment was entered for the plaintiffs against the first defendant for the sum of RM149,315,000 together with interest thereon and costs. The difference between the sum claimed [RM157,815,000] and the judgment sum [RM149,315,000] amounting to approximately RM8,405,000 is explained in para 6 of encl 205A which states that:

6. It is material to note that the sum of RM8,500,000.00 was paid by the 1st defendant to the plaintiffs pursuant to the terms of the ABBA bonds Contracts prior to the filing of this suit. This sum was not paid by the 1st and 4th to 12th defendants to the Plaintiffs pursuant to the consent judgment. In fact, todate the Consent Judgment remains unsatisfied as stated in paragraph 7 below.

Therefore, the first defendant has voluntarily submitted to judgment for whatever that was owing by them when proceeding were first initiated by the plaintiffs.

QUESTIONS TO BE DETERMINED UNDER O 14A

[20] Vide encl 208, the second defendant raises the following questions to be determined by this court without full trial of the action:

> What is the consequence on the plaintiff's causes of actions and claims against the second defendant in these proceedings as a result of the consent judgment dated 7 July 2008 [encl 200] that was made between the plaintiffs and the first, fourth, fifth, sixth to 12th defendants?

[21] Vide encl 205, the third defendant raises the following questions to be determined by this court without full trial of the action:

(a) Assuming (and if it can be established) that KAF is in breach of its contractual obligations, as alleged in para 57 of the statement of claim, do the plaintiffs have a valid claim against KAF for damages other than nominal damages, given that the plaintiffs have entered into the consent judgment at encl 200 with all the defendants (except KAF and the second defendant)?

(b) Assuming (and if it can be established) that KAF is in breach of any duty of care towards the plaintiffs, as alleged in para 58 of the statement of claim, do the plaintiffs have a valid claim against KAF for damages other than nominal damages, given that the plaintiffs have entered into the aforesaid consent judgment?

(c) On the plaintiffs' pleadings, and on the assumptions made in relation to questions (1) and (2) above, can KAF, in law, be liable jointly and severally with the first defendant and the second defendant for its breaches as alleged in paras 57 and 58 of the statement of claim.

A THE SECOND DEFENDANT'S ARGUMENTS

[22] The second defendant argues that the damage claimed by the plaintiffs against the second and third defendants is coincident with the damage claimed by the plaintiffs against the other defendants, being the sum of RM149,319,000 only. The claim against the first defendant and the second defendant is for a coincident loss ie the identical amount. Therefore, if the damage claimed is coincident, as in this case, the second defendant submits that the effect of the consent judgment would preclude the present action against the second defendant.

[23] The second defendant further submits that the consent judgment conclusively fixed the full measure of the plaintiffs' damage for which the first, fourth and sixth to 12th defendants are liable for as against the first defendant, the plaintiffs, obtained judgment for the full measure of the plaintiffs' loss, being the sum of RM149,315,000, premised on their claim for breach of contract. It cannot be doubted that once the judgment sum is satisfied by the first defendant, the plaintiffs would have achieved full satisfaction of their claim. The fact that the plaintiff's did not rely on their claim for fraudulent breach of trust is of no consequence for the present purpose. Over and above the full extent of the plaintiffs' loss in the sum of RM149,315,000, the plaintiffs also obtained judgment against the fourth and sixth to 12th defendants for damages to be assessed with interests thereon and costs.

[24] The second defendant further argues that by entering into the consent judgment with the first, fourth, sixth to 12th defendants, the plaintiffs had accepted the terms of the consent judgment in full and final settlement of the plaintiffs' claim for damages arising from the issuance of the ABBA bonds.

[25] In respect of the plaintiffs' alleged claim in the tort of negligence, the second defendant contends that the plaintiffs would not be able to prove any damage against the second defendant. As the existence of damage is an essential ingredient for an action in tort of negligence, the plaintiffs' alleged claim in tort would be extinguished.

[26] In respect of the plaintiffs' alleged causes of action in contract and trust, such alleged causes of action are in respect of the same damage, which had been satisfied by the terms of the consent judgment.

[27] It is also the second defendant's submission that therefore, the plaintiffs are no longer entitled to maintain the instant action for alleged breach of trust, breach of contract and negligence against the second defendants in respect of the same damage.

[28] To the second defendant, the consent judgment must be regarded as having discharged the second defendant's liability towards the plaintiffs for the same loss as soon as the consent judgment was entered, and not when the payment was actually made in satisfaction of the consent judgment. Payment of the consent judgment sum is only a matter of timing.

[29] In the circumstances, it is the second defendant's submissions that by reason of the consent judgment, the plaintiffs are precluded from maintaining the alleged causes of action in trust, contract and tort of negligence against the second defendant and the plaintiffs' alleged causes of action be dismissed accordingly with costs.

[30] Further, the second defendant contends that by entering into the consent judgment with the first, fourth to 12th defendants, the plaintiffs had unequivocally elected to pursue their remedies against the first, fourth, sixth to 12th defendants and abandoned their rights and remedy against the second defendant. the plaintiffs are therefore precluded from maintaining the instant action against the second defendant.

[31] The second defendant also argues that the plaintiffs' right to seek a remedy against the first, fourth to 12th defendants arising from the first defendant's failure to redeem the ABBA bonds were inconsistent with the plaintiffs' rights to seek remedy against the second defendant for alleged breach of the second defendant's obligations as trustees. By entering into the consent judgment and obtaining judgment for the full measure of the plaintiffs' loss against the first defendant and judgment for damages to be assessed against the fourth, sixth to 12th defendants over and above the plaintiffs' loss, the plaintiffs had unequivocally elected their rights to pursue the remedy as against the first, fourth, sixth to 12th defendants.

[32] Having elected to pursue the remedy as against the first, fourth, sixth to 12th defendants, the second defendant concludes that it is no longer open to the plaintiffs to pursue the claim against the second defendant.

[33] Alternatively, the second defendant suggests that, if the court is minded to interpret the consent judgment as being subjected to actual satisfaction of the judgment sum by the first, fourth and sixth to 12th defendants, the second defendant requests that the trial of the instant action be stayed pending execution of the consent judgment by the plaintiffs against all the other defendants for the following reasons:

(i) if the judgment sum under the consent judgment is satisfied, the plaintiffs would have been compensated for their loss thereby rendering the plaintiffs' claims against the second defendant academic;

(ii) the plaintiffs had the benefit of the Mareva injunction against the first, fourth to 12th defendants for the purposes of satisfying the judgment sum obtained and yet agreed to dissolve the Mareva injunction as at the date the consent judgment was entered; and

(iii) by agreeing to dissolve the Mareva injunction, the plaintiffs had prejudiced the second defendant's prospect of recovering contribution from the first defendant.

THE THIRD DEFENDANT'S ARGUMENTS

[34] The third defendant takes the position that the plaintiffs cannot in law have three separate judgments from Pesaka (first defendant), Mayban Trustee (second defendant) and KAF Discounts (third defendant) each for the sum of RM157,815,000 (or RM149,315,000) when its actual loss was just RM157,815,000 (or RM149,315,000).

[35] The third defendant agrees that every joint tortfeasor is liable to the whole of the damage which the tort has caused the plaintiff and that the plaintiff is therefore entitled to judgment against each of the joint tortfeasors for the whole of the damage which he has suffered, but he cannot recover in the aggregate more than the sum at which that damage is assessed. But Pesaka, Mayban Trustee and KAF are not being sued as joint tortfeasors; and if the claims against Mayban Trustee and KAF were allowed, the plaintiffs would be recovering by way of damages, three times the amount of their actual loss.

[36] The third defendant submits that the plaintiffs should take step to enforce the consent judgment. If they intend to continue with their claim against KAF, they must show that the judgment cannot be satisfied. Unless they can do so, KAF is entitled to take the position that the plaintiffs have agreed to recover their claim in full from Pesaka. In such a situation, the plaintiffs will only be entitled to nominal damages even if they prove their case against KAF (third defendant).

THE PLAINTIFFS' ARGUMENTS

[37] The plaintiffs on the other hand, take the position that, for the following reasons, the consent judgment has absolutely no impact on the plaintiffs' claim against the second and third defendant (Mayban Trustees and KAF on the following grounds):

(i) The consent judgment expressly preserves the right of the plaintiffs to continue with their claims against the said two defendants, thereby evidencing the intention of the parties to the contract;

(ii) As successive contract-breakers, Mayban Trustees and KAF are liable to the plaintiffs for their separate breaches for contracts, independent of Pesaka's admission of its breach of contract;

(iii) As several tortfeasors, Mayban Trustees and Pesaka committed separate and independent acts or omissions which resulted in separate breaches of duties owed to the plaintiffs for which they remain liable; and

(iv) Insofar as the plaintiffs' claims against the other defendants (other than Pesaka) namely, Rafie, Murnina and the seven Amdac companies, which were compromised under the consent judgment, are concerned, such claims arise by their conduct post the bond contracts and have no direct connection with the bonds. Instead, these other defendants were sued in constructive trust for holding assets belonging to Pesaka. Further, in the case of the seven Amdac companies, a declaration that their corporate veil be lifted was also sought. Releasing one of them, has no impact whatsoever to the plaintiffs' claims against Mayban Trustees and KAF.

[38] The plaintiffs concludes that the consent judgment does not release the second and third defendants from their liability, unless full satisfaction of the judgment is made by the other defendants as in the consent judgment. To the plaintiffs, if two or more several tortfeasors are sued, settlement with one tortfeasor does not release the other.

[39] The plaintiffs stand is that all the three questions posed by the third defendant should be answered in the affirmative and the answer to the sole question posed by the second defendant is that no consequences follow on the plaintiffs' cause of action or claims against the second and third defendants as a result of the consent judgment dated 7 July 2008.

FINDINGS OF THE COURT

Interpretation of the consent judgment

[40] The established legal principle is that if a consent judgment expressly or impliedly provides that a defendant is not released notwithstanding the entry into judgment by another defendant, the court will honour the judgment as a contract.

[41] It is trite law that a consent judgment is to be interpreted in the same way as a contract. Thus, the usual principles of contractual construction apply in the instant case: the paramount consideration is to ascertain the intention of the parties to the consent judgment. Such intention is objectively

assessed by the court, in particular by reviewing the language employed in the consent judgment. In the instant case, paras 6 and 7 of the consent judgment are critical:

> (6) the first defendant shall participate and pursue its defence and/or counterclaim for such relief and/or damages and losses against the second and third defendants in this suit.
>
> (7) the consent judgment herein between the plaintiffs and the said defendants shall not prejudice or affect the plaintiffs claim in this civil suit against the second and third defendants, which shall proceed to trial.

[42] The Court of Appeal of England in *Apley Estates Co v De Bernales* [1947] 1 All ER 213 (CA), had to consider whether an agreement by a plaintiff not to sue one joint tortfeasor operated as a discharge of other tortfeasors. In concluding that it had no such effect, Morton LJ stated:

> One of the defendants is a company called the Great Boulder Proprietary Gold Mines Ltd the plaintiffs arrived at terms of settlement with that company, and, on 16 January 1946, an order was made by Evershed J, which, omitting the formal part, was in the following terms
>
> ... the plaintiffs and the said defendants (the Great Boulder Co) by their counsel stating that they have agreed to the terms set forth in the schedule hereto and consenting to this order, this court doth order that all the further proceedings in this action against the said defendants, the Great Boulder Proprietary Gold Mines Ltd, be stayed except for the purpose of carrying the said terms into effect for which purpose the parties are to be at liberty to apply.
>
> The terms set out are:
>
> (1) In consideration of the payment of £25,000 by the defendants, the Great Boulder Proprietary Gold Mines Lt, to Messrs Nordon & Co, the solicitors for the plaintiffs, for and on behalf of the plaintiffs in the abovementioned action, the receipt whereof Messrs Nordon & Co hereby acknowledge, the plaintiffs in the said action will not nor will any of them sue or continue to sue the said defendants in respect of any of the matters the subject-matter of the said action ... or in respect of their respective claims in respect of such matters or any of them, but this agreement shall not be construed or operate as a release of any cause of action of the plaintiffs or any of them against the defendants or any of them in the said action ... and shall not prejudice or affect the rights of the plaintiffs therein to proceed with their claims therein against the defendants other than the defendants, the Great Boulder Proprietary Gold Mines Ltd.

(2) The plaintiffs and the defendants, the Great Boulder Proprietary Gold Mines Ltd, hereby consent to the making of an order in the said action whereby all further proceedings therein against the said defendants be stayed upon the above terms, each party bearing his or her or their own costs.

So far as the wording of those terms of settlement is concerned. it is plain that the intention of the parties was that they should not operate as a release or extinguishment of the cause of action against the defendants, the Great Boulder Co, but that they should operate merely as an agreement not to sure Great Boulder. No doubt, the agreement was put in that form so that the other persons who are alleged to be joint tortfeasors should not be released from their liability to the plaintiffs. However, the defendant, Mr de Bernales, in certain proceedings which I need not describe in detail contends that, whatever may have been the intention of the parties to that agreements, the effect of it in law is that he is released from any liability to the plaintiffs in respect of the alleged torts in which he was said to be a joint tortfeasors with the Great Boulder Co. The matter came before Evershed J who rejected that contention, and the defendant, Mr de Bernales, appeals.

I find myself entirely in agreement both with the decision of Evershad J and with the reasons on which that decision was based.

The only ground on which counsel for Mr de Bernales can rely is that the proceedings were stayed by the order to which I have referred. Owing to certain procedural difficulties it may be that the plaintiffs, after that order, could not successfully sue the Great Boulder Co, but, in my judgment, the imposition of that stay does not have the effect of extinguishing the cause of action against Great Boulder. Having regard to the reasons on which the rule is founded, I do not accept the argument that by reason of that order the cause of action against Mr de Bernales is extinguished. Such a result would be entirely contrary to the intention of the parties to the agreement embodied in the order, but if that were the results of the order as a matter of law, we should be bound to allow this appeal. In my judgment, however, that is not the result as a matter of law. Inability to recover judgment against one of two tortfeasors may be due to the fact that the cause of action against that tortfeasors is extinguished, but it may be also due to other reasons. It is a non-sequitur to say... ' A. Cannot recover judgment against one joint tortfeasor, and, therefore, the cause of action is extinguished against all the joint tortfeasors'. In my judgment, this appeal should be dismissed.

[43] In *Gardiner v Moore* [1966] 1 All ER 365, an action for libel was brought against the author of a newspaper article, against the publishers and against the printers. All three defendants pleaded qualified privilege among other defences. The plaintiff, by his reply, alleged express malice. On the day before the hearing counsel for the plaintiff was instructed that terms of settlement had been agreed with the publishers and the printers (the second and third defendants), and that the claims against them would be discharged on statements being made on their behalf by counsel in open court. The

agreed terms were put into writing. It was not expressed in the two agreements that the plaintiff reserved his rights against the first defendant, the author of the article. The issue was raised whether the discharge of the claims against the second and third defendants discharged also the claim against the first defendant.

[44] The court held that assuming that the three defendants were joint tortfeasors, the written agreements did not discharge the plaintiff's cause of action against the first defendant for the following reasons:

(i) it was an implied term of each of the two agreements that the plaintiff reserved all his rights against the first defendant and would prosecute the action against him and this intention of the plaintiff, being known to all defendants, formed the basis on which his claims against the second and third defendants were settled.

(ii) accordingly, there being no material distinction for the present purpose between an implied term and an express term, the effect of the two agreements was that of covenants not to sue further the second and third defendants, and neither of the two agreements, interpreted in the light of the accompanying statements that were to be made by counsel in open court, amounted to a release by the plaintiff of his cause of action.

[45] The following passages from the judgment of Thesinger J are relevant:

> From the commonsense point of view it was quite clear to everybody that Mr Lowe had no intention to release the first defendant, and that he had no authority to do it. Having considered the arguments — and, as I say, except for what was added today I have had the advantage of being able to consider them over the weekend — my conclusions are these:
>
> (i) I hold that there is no material distinction between an express term in an agreement and one which is implied by law because it was so obviously the basis for the agreement that it was idle to express it by specific words.
>
> (ii) I am satisfied that all solicitors and counsel, and through them all the parties to this case, knew quite well at all material times that both the plaintiff and his counsel did not intend to release or discharge the first defendant but, on the contrary, intended and desired to continue the action against him.
>
> (iii) I am quite satisfied that, the intention being known to all, it was the basis on which the claim against the proprietors of the newspaper, and the claim against the printers of the newspaper, were settled.

[46] In the present case, the court finds in favour of the plaintiffs on this ground because it is plain and obvious that the intention of the plaintiffs and the ten defendants who consented to the judgment was that the plaintiffs' case against Mayban Trustees (second defendant) and KAF (third defendant) remains unaffected, and should proceed to trial, as the express words in para 7 of the consent judgment demonstrate.

SATISFACTION OF THE CONSENT JUDGMENT

[47] By the terms of the consent judgment (encl 200), Pesaka (first defendant) agreed to pay the plaintiffs the sum of RM149,315,000, together with interest and costs. Although nearly one month has passed since the consent judgment was recorded by this court, Pesaka has failed to pay a single sen to the plaintiffs. Accordingly, the consent judgment remains wholly unsatisfied. Thus, as far as the plaintiffs are concerned, judgment has only been entered, no monies have been paid thereunder and there has been no recovery.

[48] In *United Australia Ltd v Barclays Bank, Ltd* [1941] AC 1 (HL), a cheque payable to the appellants was converted by the *M* company and collected for that company by its bankers, the *B* bank. The appellants brought an action against the *M* company for the amount of the cheque either as money lent or as money had and received to the use of the appellants, but they discontinued that action and no final judgment was obtained. The appellants afterwards brought the present action against the *B* bank for conversion of the cheque.

[49] The House of Lords held, that the appellants by merely initiating proceedings against the *M* company for money lent or for money had and received had not thereby elected to waive the tort so as to be precluded from bringing the present action in tort. In such a case it is judgment and satisfaction in the first action, and not merely the bringing of the claim, which constitutes a bar to a second action.

[50] The court relies on the following passages which are of relevance to the instant case:

> The question to be decided in this appeal is whether the proceedings against MFG, carried on up to the point that they in fact reached, constitute a valid ground of defence for the respondent bank and so relieve it in the present action from a liability, which would otherwise certainly attach to it, to repay to the appellant company the sum of 19001 of which they had been deprived and which they have not received from any other source (per Viscount Simon LC).

A To avoid misunderstanding, I must add that I do not think that the respondents in the present case would escape liability, even if judgment had been entered in the appellant company's earlier action against MFG. What would be necessary to constitute a bar, as Bayley J pointed out in *Morris v Robinson*, would be that, as the result of such judgment or otherwise, the appellants should have received satisfaction (per Viscount Simon LC).

B

It may be as well to remember that in the course of dealing with the cheque there were three separate conversions by three different persons: (1) by Emons; (2) by the Bank; (3) by MFG Trust Ld; each of whom could be sued separately for damages for separate tort (per Lord Atkin).

C ... the question still remains, is such a proceeding also a bar against the bringing of an action in either of these two forms against another defendant, ie, if there are two separate tortfeasors who have committed separate torts in respect of the same property and the plaintiff elects to sue one in indebitatus assumpsit, is he precluded from thereafter suing the other either in tort or for money had and received? This is the problem posed but not solved by Lord Haldance in *John v Dodwell*.

D

It is plain that an action against one such separate tortfeasor for conversion is no bar to an action against another, nor indeed does the signing of judgment against the first end of the matter. the plaintiff can even then proceed to judgment against the second, and his rights are not exhausted until from one or both he has obtained the full measure of his loss... (per Lord Porter).

E

[51] The Privy Council decision from Singapore in *Wah Tat Bank Ltd v Chan Cheng Kum* [1975] 2 All ER 257 (PC) is also relevant, because it involved the interpretation of the Singapore equivalent to s 10 of the Civil
F Law Act 1956 of Malaysia. In that case, two banks brought an action in the High Court of Singapore against a shipping company and *C*, the company's chairman and managing director, claiming damages jointly against them for conversion. Judgment was entered against the company but the issue of *C*'s liability was remitted for a retrial. The judgment against the company
G remained wholly unsatisfied. *C* contended that, since judgment had been entered against the company, the banks were barred from recovering judgment on the ground that s 11(1)(a) of the Singapore Civil Law Act only made provision for an action against a tortfeasor who would 'if sued' have been liable and he had already been 'sued'. The Privy Council held that on
H the true construction of s 11(1)(a) the words 'any other person who would, if sued, have been liable...' meant a person who had been held liable when sued to judgment, that is, upon full payment. Although the company and *C* had been sued jointly in the same action and judgment had been entered against the company, *C* had not been held liable since he had not been sued
I to judgment and the banks were not therefore precluded from obtaining judgment against him.

[52] The only limit is that in a case involving indivisible damage, a plaintiff is precluded from obtaining double recovery from two or more defendants

against whom judgment has been entered, and payments made thereunder. In the Malaysian Privy Council case of *Mahesan v Malaysia Government Officers' Co-operative Housing Society Ltd* [1978] 2 All ER 405 (PC), the issue of double recovery was considered, and Lord Diplock delivering judgment, observed:

> In assessing the damages under head (2) at $443,000 the Federal Court made no allowance for the fact that the housing society had already been adjudged entitled to recover the amount of the bribe from the appellant under head (1), thus reducing its actual loss as a result of his dishonest breach of duty by $122,0000 to $321,000. The judgment of the Federal Court thus gave to the housing society in the civil action against the appellant double recovery of the amount of the bribe that he had received; or, if account is also taken of the statutory penalty ordered to be paid to it in the criminal proceedings, treble recovery of that sum...
>
> Although as a matter of decision the *Salford* case was concerned only with the liability of the briber, the dicta summarised in the headnote deal also with the liability of the agent. It was accurate to say that the principal had two distinct remedies against the agent, one for money had and received and the other for the tort of fraud; but it was flying in the face of a long line of authority to say that these two remedies were not alternative but cumulative. The authorities to this effect are discussed at length in the speeches in *United Australia v Barclays Bank Ltd*, a case in which the House of Lords confirmed the principle that where the same facts gave rise in law to two causes of action against a single defendant, one (formerly lying in assumpsit) for money had and received and the other for damages for tort, the plaintiff must elect between the remedies. It held, however, that such election was not irrevocable until judgment was recovered on one cause of action or the other. The House of Lords also held that where the same facts gave rise in law to a cause of action against one defendant for money had and received and to a separate cause of action for damages in tort against another defendant, judgment recovered against the first defendant did not prevent the plaintiff from suing the other defendant in a separate action: but that to the extent that the judgment was actually satisfied this constituted satisfaction pro tanto of the claim for damages in the cause of action against the second defendant.

[53] Finally, the Privy Council in an appeal from Hong Kong in *Personal Representatives of Tang Man Sit v Capacious Investments Ltd* [1996] AC 514 (PC) conducted a comprehensive discussion of the subjects of double recovery, alternative and cumulative remedies. The following illuminating passages from the judgment of Lord Nicholls are reproduced below:

> Accordingly, the submission continued, since the present plaintiff had elected to take an account of profits, it was barred from pursuing any claim for damages based on the existence of the lettings or on the terms of the lettings or on the inevitable consequences of the lettings. Head *B* is such a claim. Hence the plaintiff was not entitled to recover any damages. That was the essence of the defendant's submission.

Two Remedies

Their Lordships will consider first whether the plaintiff did choose to take remedy of an account of profits, with the consequence that it could no longer pursue a claim for damages so far as this would be inconsistent with an account of profits. This issue lies at the heart of this case. This issue calls for consideration of the principles governing election between remedies.

The law frequently affords an injured person more than one remedy for the wrong he has suffered. Sometimes the two remedies are alternative and inconsistent. The classic example, indeed is (1) an account of the profits made by a defendant in breach of his fiduciary obligation and (2) damages for the loss suffered by the plaintiff by reason of the same breach. The former is measured by the wrongdoer's gain, the latter by the injured party's loss.

Sometimes the two remedies are cumulative. Cumulative remedies may lie against one person. A person fraudulently induced to enter into a contract may have the contract set aside and also sue for damages. Or there may be cumulative remedies against more than one person. a plaintiff may have a cause of action in negligence against two persons in respect of the same loss.

Alternative remedies

Faced with alternative and inconsistent remedies a plaintiff must choose, or elect, between them. He cannot have both. The basic principle governing when a plaintiff must make his choice is simple and clear. He is required to choose when but not before, judgment is given in his favour and the judge is asked to make orders against the defendant. A plaintiff is not required to make his choice when he launches his proceedings. He may claim one remedy initially, and then by amendment of his writ and his pleadings abandon that claim in favour of the other. He may claim both remedies, as alternatives. But he must make up his mind when judgment is being entered against the defendant. Court orders are intended to be obeyed. In the nature of this, therefore the court should not make orders which would afford a plaintiff both of two alternative remedies.

Cumulative remedies

The procedural principles applicable to cumulative remedies are necessarily different. Faced with alternative and inconsistent remedies a plaintiff must choose between them. Faces with cumulative remedies a plaintiff is not required to choose. He may have both remedies. How may pursue one remedy or the other remedy or both remedies, just as he wishes. It is a matter for him. He may obtain judgment for both remedies and enforce both judgments. When the remedies are against two different people, he may sue both persons. He may do so concurrently, and obtain judgment against both. Damages to the full value of goods which have been converted may be awarded against two persons for successive conversions of the same goods. Or the plaintiff may sue the two persons successively. He may obtain judgment against one, and take steps to enforce the judgment. This does not preclude him from then suing the other. There are limitations to this freedom. One limitation is the so called rule in *Henderson v Henderson* (1843) 3 Hare 100. In the interests of fairness and finality a plaintiff is required to bring forward his whole case against a defendant in one action. Another limitation is that the court has

power to ensure that, when fairness so requires, claims against more than one person shall all be tried and decided together. A third limitation is that a plaintiff cannot recover in the aggregate from one or more defendants an amount in excess of his loss. Part satisfaction of a judgment against one person does not operate as a bar to the plaintiff thereafter bringing an action against another who is also liable, but it does operate to reduce the amount recoverable in the second action. However, once a plaintiff has fully recouped his loss, of necessity he cannot thereafter pursue any other remedy he might have and which he might have pursued earlier. Having recouped the whole of his loss, any further proceedings would lack a subject matter. This principle of full satisfaction prevents double recovery.

[54] This strong line of House of Lords and Privy Council authority is hardly surprising. It reflects the importance of compromise and settlement of civil actions filed in court, and the encouragement by the courts to so settle. This policy received endorsement from Lord Hope in *Jameson v Central Electricty Generating Board* [1999] 1 All ER 193 (HL):

... But it is well known that many claims are settled without the amount due as damages having been adjudicated by the court. They are settled by agreement between the parties. Were it not for the fact that most claims of damages are settled in this way, the parties would be exposed to greater expense and uncertainty and the burden of work on the courts would be intolerable. There is a strong element of public interest in facilitating the disposal of cases in this way.

SUCCESSIVE CONTRACT-BREAKER

[55] From the perspective of a breach of contract cause of action, if it is a case of successive contract-breakers, consent judgment with one contract-breaker has no effect on another contract-breaker.

[56] A review of the eight causes of action pleaded on behalf of the plaintiffs in the statement of claim in the present suit will indicate that the breach of contract cause of action is pleaded against Pesaka (first defendant), Mayban Trustees (second defendant) and KAF (third defendant). Thus, the court is of the view that each of the said three defendants were in breach of their individual obligations under the numerous interlinked but separate bond contracts. In law, the said three defendants are known as 'successive contract-breakers'.

[57] In *Heaton v AXA Equity* [2000] 4 All ER 673 (CA) the English Court of Appeal had to consider claims against successive contract-breakers. The leading judgment was delivered by Chadwick LJ who observed:

56. I have examined the decision of the House of Lords in *Jameson*'s case at some length, both because the judge relied upon it in reaching the conclusion which he did and because it was put at the forefront of the argument for the respondents on this appeal. But, in the light of that examination, I am not persuaded that decision provides much assistance in the resolution of the issue in the present case. This is not a case (save, perhaps, in relation to the publication of reports) in which the alleged wrongdoers can be said to be concurrent tortfeasors. Rather, the alleged wrongdoers are successive contract breakers.

57. The contractual claims against target on the one hand and against equity and law on the other hand are claims in respect of consecutive breaches of separate contracts. The claims are linked because it was alleged in the target action that the wrongful termination of the equity and law agreement by equity and law was caused by the wrongful termination of the target agreement by target. It was that allegation which led to the claim in the target action for all loss flowing from the termination of the equity and law agreement. But the cause of action are independent. An allegation of loss is not a necessary element in a claim for breach of contract. In particular, it cannot be said that the cause of action in respect of the alleged breach of contract by equity and law is extinguished by satisfaction of the claim in the target action. The most that can be said is that, if and to the extent that the claimants were compensated by the settlement of the claim in the target action for the loss flowing from the termination of the equity and law agreement, the claimants cannot make double recovery in respect of the same loss by a claim for damages in the equity and law action. So that, if they have received full compensation for that loss under the settlement, the damages recoverable in the equity and law action will be nominal.

58. Unless, therefore, the contractual claims in the equity and law action should be stayed on the basis that the damages recoverable must, inevitably, be nominal — an issue to which I return later in this judgment — the decision of the House of Lords in *Jameson*'s case on what I have described as the 'full satisfaction' question is not in point. It is impossible, in the present case, to hold that the contractual claims against equity and law have been extinguished by any settlement agreement made between the claimants and target or Abbey Life.

[58] On appeal, the House of Lords [2002] 2 AC 329 (HL) upheld the decision of the Court of Appeal. The following passages from the judgment of Lord Bingham are apposite:

> My Lords, the issue in this appeal may be expressed in this way: if *A*, having sued *B* for damages for breach of contract, enters into a settlement with *B* expressed to be in full and final settlement of all its claims against *B*, is *A* thereafter precluded from pursuing against *C* a claim for damages for breach of another contract to the extent that this claim is for damages which formed part of *A*'s claim against *B*? Expressed in another way, the issue is whether the majority decision of the House in *Jameson v Central Electricity Generating Board* [2000] 1 AC 455, properly understood, laid down any rule of law and, if so, whether that rule applies to successive contact-breakers as well as concurrent tortfeasors.
>
> In considering whether a sum accepted under a compromise agreement should be taken to fix the full measure of *A*'s loss, so as to preclude action against *C* in tort in respect of the same damage, and so as to restrict any action against *C* in contract in respect of the same damage to a claim for nominal damages, the terms of the settlement agreement between *A* and *B* must be the primary focus of attention, and the agreement must be construed in its appropriate factual context. In construing it various significant points must in my opinion be borne clearly in mind:
>
> (1) The release of one concurrent tortfeasor does not have the effect in law of releasing another concurrent tortfeasor and the release of one contract-breaker does not have the effect in law of releasing a successive contract-breaker.
>
> (2) An agreement made between *A* and *B* will not affect *A*'s right against *C* unless either (a) *A* agrees to forgo or waive rights which he would otherwise enjoy against *C*, in which case his agreement is enforceable by *B*, or (b) the agreement falls within that limited class of contracts which either at common law or by virtue of the Contracts (Rights of Third Parties) Act 1999 is enforceable by *C* as a third party.
>
> (3) The use of clear and comprehensive language to preclude the pursuit of claims and cross-claims as between *A* and *B* has little bearing on the question whether the agreement represents the full measure of *A*'s loss. The more inadequate the compensation agreed to be paid by *B*, the greater the need for *B* to protect himself against any possibility of further action by *A* to obtain a full measure of redress.
>
> (4) While an express reservation by *A* of his right to sue *C* will fortify the inference that A is not treating the sum recovered from *B* as representing the full measure of his loss, the absence of such a reservation is of lesser and perhaps of no significance, since there is no need for *A* to reserve a right to do that which *A* is in the ordinary way fully entitled to do without any such reservation.
>
> (5) If *B*, on compromising *A*'s claim, wishes to protect himself against any claim against him by *C* claiming contribution, he may achieve

that end either (a) by obtaining an enforceable undertaking by *A* not to pursue any claim against *C* relating to the subject matter of the compromise, or (b) by obtaining an indemnity from *A* against any liability to which *B* may become subject relating to the subject matter of the compromise.

JOINT AND SEVERAL TORTFEASORS

[59] It is also an established legal principle that if two or more several tortfeasors are sued, settlement with one tortfeaser does not release the others.

[60] In the present case, only one cause of action has been pleaded against Pesaka (first defendant) namely, breach of contract. Thus, Pesaka is neither a joint nor a several tortfeasor with Mayban Trustees or KAF, for the simple reason that no claim in tort is pleaded against Pesaka. Insofar as Mayban Trustees (the second defendant) and KAF (the third defendant) are concerned, a claim in negligence is made against each of them. In the case of Mayban Trustees, the breach of duty to the plaintiffs occurred when Mayban Trustees failed to:

(i) ensure that it was the sole signatory to the three trustee accounts prior to the issuance of the bonds on first April 2004;

(ii) after discovering that it was not the sole signatory, it failed to get itself appointed as the sole signatory, whether by utilising the power of attorney or otherwise; and

(iii) to inform the plaintiffs of these facts contemporaneously or at any time from March 2004 till before the date of redemption by Pesaka of the first tranche of the bonds on 30 September 2005.

[61] The plaintiffs' claim for negligence against KAF (the third defendant) is based on its failure to ensure that prior to or at the time of the issuance of bonds:

(i) that the sole signatory of the three trustee accounts was Mayban Trustees;

(ii) that Pesaka was not entitled to 'convert' existing conventional banking accounts instead of 'opening' Shariah complaint new accounts; and

(iii) to verify 'the form and content' of the three trustee accounts.

[62] It would immediately become clear that the torts committed by Mayban Trustees and KAF are several in nature: they were separate torts committed independently by each of them at different points of time, and

not jointly. In other words, the plaintiffs do not allege collusion or conspiracy on the part of Mayban Trustees and KAF. The distinction is clearly brought by the case of *Re Koursk* [1924] P 140. The facts in that case were that by separate and independent acts of negligence on the part of each vessel a collision took place between the Clan Chisolm and the Koursk. As a direct consequence of that collision, and without any intervening act of negligence, the Clan Chisolm ran into and sank the plaintiffs' vessel, the Itria. the plaintiffs, having recovered judgment against the owners of the Clan Chisolm (who limited their liability), brought an action against the owners to the Koursk in respect of the same damage. The Court of Appeal held that the causes of action were separate and distinct; that accordingly the owners of the Clan Chisolm and the owners of the Koursk were not joint tortfeasors; and, therefore, that the judgment recovered against the owners of the Clan Chisolm was not a bar to the plaintiffs' action against the owners of the Koursk.

[63] The court relies on the following passages from the judgments of Bankers LJ and Scrutton LJ:

> The negligence of those in charge of the Koursk was in not keeping station and running into the Clan Chisholm. This negligence clearly contributed to the loss of the Itria, as the learned judge has found that after the collision with the Koursk the Clan Chisholm could not have avoided the collision with the Itria. The negligence of the Clan Chisholm, as found by the learned judge, and the House of Lords, consisted in not stopping and reversing after she hard-a-ported. This negligence contributed both to the collision with the Koursk and to the consequent collision with the Itria. The damnum no doubt is only one and the act of negligence of each contributed to that damnum, but the acts of negligence are still, in my opinion, separate. There is no possible connection between them. They began, they continued, and they ended as separate acts, and they never became a joint act (per Bankers LJ).
>
> In the present case the Koursk was guilty for negligence in proceeding out of course across the line of its convoy; the Clan Chisholm was guilty of quite independent negligence in not reversing when the action of the Koursk was observed. These two separate and independent negligence resulted in a collision with the Itria. In my view, the Koursk and the Clan Chisholm were not joint tortfeasors of the same tort, but separate tortfeasors of two different torts, and therefore at common law judgment against one in respect of the cause of action against it would not be an answer to a claim against the other in respect of the different cause of action on which it was sued (per Scrutton LJ).

[64] When considering the matter from the tort perspective, it is vital to recall the principle of assessment of damages, which is one of the three essential ingredients to a tort. The classic statement is that of Devlin LJ (in *Dingle v Associated Newspaper Ltd* [1961] 1 All ER 897 (CA)):

A This conclusion appears to me to be in accordance with, and indeed to exemplify, a fundamental principle in the law of damage. Where injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it. As between the plaintiff and the defendant it is immaterial that there are others whose acts also have been
B a cause of the injury and it does not matter whether those others have or have not a good defence. These factors would be relevant in a claim between tortfeasors for contribution but the plaintiff is not concerned with that; he can obtain judgment for total compensation from anyone whose act has been a cause of his injury. If there are more than one of such persons, it is immaterial to the plaintiff whether they are joint tortfeasors of not.

C This principle was accepted in Malaysia by the Court of Appeal and the Federal Court in the *Highland Towers* case, namely *Arab-Malaysian Finance Bhd v Steven Phua* [2003] 1 MLJ 567 (CA) and *Majlis Perbandaran Ampang Jaya v Steve Phua* [2006] 2 MLJ 389 (FC).

D CONCLUSION

[65] Thus, having regard to these settled principles of law, Mayban Trustees and KAF face insurmountable obstacles in all the recognised categories in
E arguing that they have been released by reason of the plaintiffs entering into consent judgment with the other ten defendants on 7 July 2008, but without receiving any satisfaction thereof.

[66] Based on the above considerations the court rules that the answers to
F all the three questions posed by KAF (the third defendant) in encl 205 should be in the affirmative; and the answer to the sole question posed by Mayban Trustees (the second defendant) in encl 208 is that there is no consequence on the plaintiffs' action and claims against the second defendant in these proceedings as a result of the consent judgment dated 7 July 2008 that was
G made between the plaintiffs and the other defendants.

[67] In the circumstances, the court rules that both the preliminary issues applications (encls 205 and 208) are without merit and therefore be dismissed
H with costs. The plaintiff's actions and claims against the second and third defendants should continue and proceed for full trial.

Applications dismissed with costs.

I Reported by Ashgar Ali Ali Mohamed